92-147

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

LASZLO PERE, Petitioner

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Eleventh Circuit Court of Appeals erred in affirming the decision of the Board of Immigration Appeals without an opinion when the decision of the Board was erroneous and without basis.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Laszlo Pere and Respondent, Immigration and Naturalization Service.

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LASZLO PERE, Petitioner

vs.

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Laszlo Pere respectfully prays that a writ of certiorari issue to review the April 13, 1992 judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

On April 13, 1992, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of Board of Immigration Appeals without an opinion. The order of the United States Court of Appeals for the Eleventh Circuit is included in the Appendix hereto, P. A1, infra.

The opinion and decision of Board of Immigration Appeals dated June 12, 1991 is included in the Appendix hereto, P. A2, infra.

The decision of the Immigration Court dated December 15, 1987 is included in the Appendix hereto, P. A10, infra.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE FACTS

Petitioner, Laszlo Pere is a 25-year old male and citizen of Hungary. Pere filed a request for asylum in the United States on or about December 5, 1986. At the time of his arrival into the United States and request for asylum he was about twenty(20) years old. He completed high school and later received a certificate from music school and a technical degree in electronics and he is a Roman Catholic.

Immigration and Naturalization Service, hereinafter called "INS" called Pere for an

interview on January 23, 1987 on his asylum request. INS denied Pere's request for asylum on June 3, 1987 and on July 24, 1987 INS informed Pere that he will be deported pursuant to Section 241 (a)(2) of the Immigration and Nationality Act, hereinafter called "INA".

INS notified Pere that he will be notified to appear before an Immigration Judge, hereinafter called "IJ".

Pere appeared before IJ on December 15, 1987 in Atlanta, Georgia where he renewed his request for asylum and presented evidence in support of his asylum claim. At the conclusion of the hearing IJ denied Pere's asylum request. On December 28, 1987, Pere filed a timely notice of appeal to Board of Immigration Appeals, hereinafter called "BIA". Pere filed motion to reopen and reconsider his case before BIA.

By a decision dated June 12, 1991 nearly five (5) years after filing his asylum request with INS, BIA dismissed Pere's appeal and denied his motion to reopen. Pere filed a Notice of Appeal and a

petition for review with the United States Court of Appeals for the Eleventh Circuit on August 26, 1991.

United States Court of Appeals on April 13, 1992 affirmed BIA's decision without an opinion.

Before the Immigration Court Pere testified he attended church every week and in his asylum request he had stated that upon his return to his native country of Hungary he will be imprisoned for his stay in the United States beyond the time permitted by Hungarian government and for his refusal to serve in the Hungarian military service. Pere's father is a retired major in the State Police in Hungary who is an alcoholic and he was subjecting Pere and his mother to periodic physical abuse.

Amnesty International Reports on Hungary for 1986 and 1987 in part stated that military service is compulsory in Hungary and the law does not provide for alternative civilian service outside the military system. Article 336 of the criminal code of Hungary allows courts to impose sentences of up to five years imprisonment on those who refuse military service.

After his arrival into the United States, Pere corresponded with his mother in Hungary and expressed his political views hostile to Hungarian government. He criticized actions of the Hungarian government and admired the freedom of expression people enjoyed in the United States. Pere openly discussed his views with his American friends here in the United States. Pere's mother worried about Pere's return to Hungary and after INS decision to deport Pere, Pere's mother by a letter addressed to former First Lady Mrs. Reagan, and requested assistance to keep her son in the United States. Upon the direction of Mrs. Reagan, Assistant Commissioner for Refugee, Asylum and Parole responded to the letter sent to former First Lady of the United States by Pere's mother.

Assistant Commissioner's letter and response was sent to Pere's mother from Washington, D.C. Hungarian secret police went to Pere's mother home and threatened to enter by force if she refused to open the door and they demanded to see the letter she received from Washington, D.C. Pere's mother

requested to see a search warrant. However, the secret police officers entered by force, assaulted Pere's mother and inflicted physical injuries as a result of which she lost a tooth and suffered cuts and bruises. In addition, secret police officers inflicted property damage to the home of Pere's mother. Pere's mother by a letter informed the actions of secret police officers to her son in the United States and Pere in response to this letter severely criticized the actions of the Hungarian government officials.

BIA's decision stated that Pere failed to show fear of persecution required for request for asylum and withholding of deportation. BIA stated that at the time of the events during 1988, Hungary was governed by Communist political apparatus and secret police in Hungary were "active and powerful" citing Country Reports on Human Rights Practices for 1988, Committee on Foreign Relations, U.S. House of Representatives by the Department of States. However, BIA's decision dated June 12, 1991 stated that due to the change of circumstances in Hungary

the evidence submitted by Pere is insufficient to warrant a remand to Immigration Court.

The United States Court of Appeals for the Eleventh Circuit Affirmed BIA's erroneous decision without any opnion.

REASONS FOR GRANTING THE WRIT

It has been long settled that the courts will reverse agency's decision under certain conditions and circumstances. When the courts find abuse of discretion by the agency the agency decision will be reversed. The agency decision will be reversed when it is made without a rational explanation or when agency inexplicably departs from the established procedures. The courts will reverse agency's decision when the decision of the agency has no logical foundation or conflicts with the regulations. The courts will reverse agency's decision when the decision is not supported by substantial evidence. Agency's decision will be set aside when the language of the statutes or the Congressional intent is clearly contrary to the decision. Deference to agency's decision is

inappropriate where there are compelling reasons and indications that the agency is wrong.

In Wong Wing Hang v. INS,360 F. 2d 715, 718-719 (2d Cir. 1966) the court described the test for abuse of discretion by the agency and stated that if the decision is made without a rational explanation or inexplicably departs from the established means and procedures it will be set aside.

BIA denied Petitioner's motion to reopen and refer the case to Immigration court because of the existance of new evidence which could not have been discovered and presented at the proceedings before the Immigration Court. In Vargas v. INS, 938 F. 2d 358 (2d Cir. 1991) the court reversed decision of BIA because BIA denied petitioner's right to file motion to reopen when agency's sole support for its decision was inapplicable, regulation conflicted with the decision and decision lacked a logical foundation.

BIA based its decision in dismissing Pere's appeal on the change of circumstances in Hungary. BIA's decision is inconsistent on its face. The

first part of the BIA's decision states that Pere failed to establish fear of persecution. Then BIA states that the reason for denying Pere's motion to reopen was due to change of conditions in Hungary in 1990 indirectly implying that but for change of conditions Pere would have presented a case of fear of persecution. The record shows Pere filed his request for asylum in 1986 and the new evidence was presented to BIA nine (9) months after the decision of the Immigration Court. BIA agreed that at the time of the presentation of the evidence which was the basis of the motion to reopen Hungary was governed by a Communist system and secret police service and other coercive parts and institutions in Hungary "were active and powerful". BIA also found that at the time the Hungarian authorities beat Pere's mother at her home and destroyed her property and that all of the events occurred in first months of 1988.

There is no doubt that BIA would have agreed in first months of 1988 Pere had shown clear and convincing case of fear of persecution. BIA by

denying Pere's motion two years and six months after presenting the evidence effectively denied him a right for remand and a fair hearing at the Immigration Court.

Under provisions of 8 CFR §3.1(b)(2) BIA has appellate jurisdiction on decisions made by immigration judge in deportation cases. Pere's case was a deportation case. 8 CFR §3.1(b)(9) state BIA has appellate jurisdiction on decisions made by immigration in asylum cases. Pere's case was also an asylum case.

Immigration judge found that evidence showed that Hungarians who stayed outside of the country beyond the time permitted were imprisoned by the government. Immigration judge concludes this kind of punishment by Hungarian government is not persecution it is prosecution for violation of the immigration laws. Immigration judge states that evading military service in Hungary which is a violation of Article 336 of Hungarian criminal code and that Pere's refusal to serve in military is because of his dislike of his father, a major in

the police force of Hungary and because of Pere's opposition to the Government of Hungary. Decision of immigration judge states that Pere's fear of imprisonment if returned to Hungary is a fear of prosecution and not a fear of persecution.

BIA agreed with the conclusion of the immigration judge on the issue of the fear of punishment for refusal to serve in military service does not constitute a fear of persecution. On the issue of Pere's motion to reopen after submitting new evidence BIA states that Pere's fear of the Hungarian secret police and other coercive elements would have been true in 1988 when secret police were active and powerful, however, at the time of the issuance of BIA's decision and because of the change of government new evidence submitted by Pere is insufficient to warrant a remand.

BIA failed to recognize that Pere's fear of persecution may still exist even under the present circumstances. If Pere had an opportunity upon a remand to have a full hearing he would have been successful in demonstrating his fear of persecution.

Pere showed that his refusal to serve in the Hungarian military service was his opposition to Hungarian government, Decision of Immigration Judge, Page A10. Evidence presented at the immigration court showed Pere is a devote Roman Catholic and he attends church every week. Pere's refusal to serve in the military service was due to religious reasons.

The courts have recognized that in some circumstances refusal to serve in the military service may be recognized as fear of persecution. Canas-Segovia v. INS, 902 F. 2d 717 (9th Cir. 1990); Ramirez-Rivas v. INS, 899 F. 2d 864 (9th Cir. 1990); Maldonado-Cruz v. INS, 883 F. 2d 788 (9th Cir. 1990); and Blanco-Lopez v. INS, 858 F. 2d 531 (9th Cir. 1988). In Matter of Izatula, Int. Dec. #3127 (BIA 1990) the Board by citing Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988) recognizing that in some circumstances refusal to serve in military may be recognized as fear of persecution. In INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) this Court stated that if there is a political motive behind

refusal to serve in military service it will be recognized as a fear of persecution. In instant case immigration judge found pere opposed Hungarian Government as reason for Pere to remain in the United States. BIA found Pere's mother was beaten and her property was destroyed by secret police of the Hungarian Government when she received a response to a letter to then First Lady Nancy Reagan. This punishment was politically motivated. BIA's decision indicates that the Board believes Pere could have established a *prima facie* case of fear of persecution after punishment of his mother in Hungary. The courts have recognized that under these circumstances a motion to reopen should be granted. Chavarria v. U.S. Dept. of Justice, 722 F. 2d 666 (11th Cir. 1984); Minwalla v. INS, 706 F. 2d 831 (8th Cir. 1983) and Rejaie v. INS, 691 F. 2d 139, 142 (3rd Cir. 1982). BIA should not make a credibility determination on motion to reopen Ghadessi v. INS, 797 F. 2d 804 (9th Cir. 1986). By a timely remand BIA would have given Pere a chance to clearly demonstrate the

reasons for refusal to serve in the service and in light of new evidence to demonstrate his fear of persecution.

8 U.S.C. §1101(a)(42)(A), INA §101(a)(42)(A) defines the term "refugee" as follows:

> The term "refugee means (A) any person who is outside of any country of such person's nationality ... who is unable or unwilling to return to ... that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Evidence showed Pere's refusal to return to Hungary and serve in military service was due to his religious belief and political opinion. The facts of this case in some respects are similar to Kaczmarczyk v. INS,933 F. 2d 588 (7th Cir. 1991), where BIA affirmed IJ's denial of alien's asylum request and application for withholding deportation. BIA's reason for the decision was that members of solidarity were no longer persecuted by Polish Government. However, the difference between Kaczmarczyk, supra and the instant case is that BIA concluded that solidarity members are the political

authorities in power in Poland and the conclusion of BIA that alien would no longer be persecuted in Poland had a basis. Pere was not afforded an opportunity to show that he would be persecuted even under the current regime due to to his religious belief, overstaying the permitted time, refusal to serve in the military service, his political opinion in opposition to the Government and due to the fact his father was very influential in Hungarian Government. The court in Kaczmarczyk, supra, at 594-595 stated that:

> That is not to say that the Board may blindly apply this recognized fact to deny automatically every asylum application submitted by Polish alien. The use of official notice does not substitute for analysis of the facts of each applicant's individual circumstances. Uncontroverted facts may be inapplicable to or of limited probative value in individual cases and the Board must remain open to this possibility. The petitioners are therefore right to demand that BIA engage in a careful, individual review of the evidence presented in their applications and hearings.

BIA violated Pere's Fifth Amendment due process rights by not allowing him an opportunity to rebut the BIA's conclusion that due to "changed

circumstances in Hungary" Pere does not have a well-founded fear of persecution. It is well known that aliens are entitled to a "meaningful opportunity to be heard", Mathews v. Eldridge, 424 U.S. 319, 348, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18 (1976), in deportation proceedings.

The well-founded fear standard can be satisfied by "credible subjective evidence", Doleres v. INS,772 F. 2d 223, 226 (6th Cir. 1985), by less than preponderance of evidence and without corroboration. In INS v. Cardozo-Fonseca, 480 U.S. 421 (1987), this Court held that a well-founded fear standard requires only showing that the alien has subjective fear with enough basis to be considered well founded and does not require objective facts or preponderance of the evidence. After the decision by this Court BIA lowered the standard stating that asylum may be proved where "a reasonable person in his circumstances would fear persecution", Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), Int. Dec. #3028. The Seventh Circuit Court of

Appeals has interpreted the standard to mean "good reason" to fear persecution is sufficient. Kubon v. INS, 913 F. 2d 386 (7th Cir. 1990).

In the case at bar Pere satisfied showing a subjective fear with enough basis to demonstrate his well-founded fear of persecution and a good reason to fear persecution. It is clear that any reasonable person in Pere's circumstances would fear persecution.

Regulations of Department of Justice and INS recognize that an applicant is not required to provide evidence that he would be "singled out individually" for persecution if he establishes "that there is a pattern and practice' in the country of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular group and political opinion and that the applicant establishes his own inclusion within the group". 8 CFR § 208.13(b)(2)(i) and 8 CFR § 208.16(b)(3). In this case in addition to the evidence showing he would individually be singled

out for persecution Pere showed he was a devote Roman Catholic and does not wish to serve in the Hungarian military service because of religious reasons in addition to his opposition to the Hungarian Government.

BIA affirmed denial of asylum claim in the Matter of Canas, 19 I&N Dec. 697 (BIA 1988) stating that "an alien with religious objections to military service does not establish eligibility foe asylum although he may be prosecuted for refusal to perform military service". BIA's decision was reversed by the court in Canas-Segovia v. INS, 902 F. 2d 717 (9th Cir. 1990) holding that punishment of conscientious objectors who refuse to serve in the military service "may amount to persecution within meaning of the Immigration and Nationality Act, if refusal is based on genuine reasons of conscience" and intent to persecute on religious basis need not be shown. The court also stated that alien had demonstrated "clear probability of persecution" existence and satisfied the standard of whether it is more likely

than not that the alien will be subject to persecution, standard higher than well-founded fear of persecution required by INA §208(a), INA §243(h), as amended, 8 U.S.C. § 1158 and 8 U.S.C. §1253(h) respectively.

In the case at bar, Pere has met this higher standard and he is eligible for relief and for withholding of deportation. Withholding of deportation is mandatory once alien establishes his eligibility, unlike asylum which is discretionary in nature under the statutes and regulations cited above. BIA has recognized that certain cases there is valid asylum claim based on refusal to serve in the military service. Matter of Salim, 18 I&N Dec. 311 (BIA 1982); Matter of Izatula, Int. Dec. #3127 (BIA 1990).

In Matter of Chen, Int. Dec #3104 (BIA 1989) BIA stated that where applicant has demonstrated past persecution INS must demonstrate why by a favorable exercise of discretion asylum should not be granted and that a fovorable exercise of discertion in asylum application may be warranted for the

humaniterian reasons "notwithstanding the fact that there is little liklihood of future persecution". In the same opinion BIA stated that INS's Operation Instruction 208.4 and its worldwide Guidelines for overseas Refugee Processing recognize that past persecution and well-founded fear of persecution as alternative methods for establishing eligibility for refugee status. In this case BIA concluded:

> Thus while the likelihood of future persecution is a factor to consider in exercising discretion in case where an asylum application is based on past persecution, asylum may in some situations be granted where there is little threat of future persecution Moreover, as with any case involving the exercise of discretion, all other factors, both favorable and adverse, should also be considered, with recognition of the special considerations present in asylum cases.

The record shows there is no single adverse factor in this case. Yet BIA failed to explain why a favorable exercise of discretion was not exercised. Pere showed and BIA agreed there was a definite past persecution in this case. There is no criminal record in this case and no evidence that Pere circumvented any of the Immigration laws.

It has been well settled that in asylum cases, applicant's own testimony cannot be rejected as self-serving. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985). Department of Justice and INS regulation recognize that credible uncorraborated testimony by the applicant may be sufficient to establish a claim of asylum and sustain burden of proof. 8 CFR §208.13(a), 8 CFR §208.16(b). The case law also supports this view. See Matter of Mogharrabi, supra, Carvajal-Munoz v. INS, 743 F. 2d 562 (7th Cir. 1984); Matter of Doss, Int. Dec. #3122 (BIA 1989).

The decision of BIA shows incorrect application of law to the facts of this case and shows BIA used old rigid standard in concluding Pere's case and it has no rational basis. By failing to exrecise a favorable exercise of discretion BIA abused discretion and BIA's decision must be reversed by this Court by granting writ of certiorari. The decision of BIA is unfair since Pere was denied an opportunity to have an opportunity to fully present his new evidence after his mother was beaten and her preoperty was destroyed by Hungarian secret

police. BIA's decision has no rational basis since it failed to explain why Pere's past persecution and persecution of his mother can not be a basis for granting his asylum. BIA in this respect departed from his own and INS's guidelines. Deference to agency's decision is inappropriate wher ther are compelling reasons and indications that the agency is wrong. The United States Court of Appeals for the Eleventh Circuit failed to recognize that BIA's decision was erroneous and affirmed it without an opinion.

BIA's decision to deny Pere's motion to reopen was clearly erroneous. This Court in INS v. Abudu, 485 U.S. 94, at 104-105 stated that there are two requirements for granting a motion to reopen. The first is to establish a *Prima facie* case for the underlying relief sought and the second is that the movant must present "priviously unavailable, material evidence". In this case BIA failed to apply any of the tests required. There was no question by BIA that the evidence presented were material and unavailable previously. On the question of

whether Pere had established a *prima facie* case BIA admitted that at least in 1988 Pere had shown previous persecution. BIA's opinion in the Matter of Chen, supra constitutes a fear of persecution. BIA summarily denied Pere's motion to reopen by stating that the conditions in Hungary had changed. Assuming granting the motion is a discretionary matter for Attorney General since involves asylum. Pere's claim for withholding deportation is another matter. BIA denied Pere an oportunity to show that the new evidence make him eligible for withholding of deportation.

Withholding of deportation is a very special relief in immigration laws. It fullfills obligation of the United States under international covenants and conventions to ensure that a refugee is not retruend to a country where he will be subject to persecution. INS v. Cardoza-Fonseca, 480 U.S. 412, 429 (1987); INS v. Stevic, 467 U.S. 407, 416-417 (1984).

In Doherty v. U.S. Department of Justice, INS, 908 F. 2d 1108 (2d Cir. 1990), the court

reversed BIA and Attorney General's decision to deny motion to reopen in an asylum case and withholding of deportation proceedings, because applicant, a member of Provisional Irish Republican Army(PIRA), presented previously unavailable, material evidence and because Attorney General abused his discretion in considering foreign policy concern in exercising discretion, which Congress intended to eliminate from asylum cases under the politically neutral purpose of the Refugee Act of 1980. Immigration appealed the court decision to this Court and this Court granted certiorari in I.N.S. v. Doherty, 111 S. Ct. 950 (1991). In Doherty, supra, the applicant was convicted of murder of British officer.

In the case at bar, Pere has no criminal record and at the immigration court hearing several of the American witnesses testified to his good moral character. If BIA's denial of Pere's motion to reopen was politically motivated the decision of the Board must be reversed.

Withholding of deportation is a fundamental protection, BIA had obligation to afford Pere a

hearing on his withholding claim due to the new evidence. Withholding of deportation may be sought when an alien initially subjected to the deportation proceedings or, if requested subsequent to the time of initial submission, pusuant to a motion to reopen under regulations. See 8 CFR §§3.2, 208.11.

When Pere submitted his evidence to show that he would be subject to persecution in 1988, it was unforseeable to him that the conditions and political system in Hungary will change. Neither the regulation nor applicable case law require expressly or even impliedly that the new evidence be unforeseeable.

Requiring applicants for asylum and withholding of deportation based on the existing facts and law is an important issue. Any foreseeable changes that may occur in the future will create an infinite number of problems. For one thing it will prevent them from exercising their rights at the time of application. Political instability is endemic to many countries from which aliens seek asylum. The role of BIA is to review the decision of the agency

under the facts existed at the time of application. BIA may not be permited to add new facts and new conditions which did not exist at the time of the decision by the agency. Most of the aliens whose request for asylum was granted would not have been able to succeed. An example of this applies to the national of Afghanistan. If INS had waited years and after change of conditions in Afghanistan decided these cases, these asylum applicants would not have been able to stay in the United States when they needed protection.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urge this Court certiorari be garnted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8757
Non-Argument Calendar

INS No. A27-714-972

LASZLO PERE,

Petitioner,

versus

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service

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(April 13, 1992)

Before HATCHET and DUBINA, Circuit Judges and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

Executive Office for Immigration Review
Falls Church, Virginia 22041

.....

File: A27 714 972 - Atlanta Date: JUN 12 1991

In re: LASZLO PERE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David C. Farshy, Esquire
90 Fairlie Street, Suite 530, Atlanta, Georgia 30303-2131

ON BEHALF OF SERVICE: Kimberly J. Taylor
General Attorney

CHARGE:

ORDER: Sec. 241(a)(2), I&N Act [8 U.S.C. §1251(a)(2)]- Nonimmigrant - Remained longer than permitted

APPLICATION: Asylum; withholding of deportation; remand

In a decision dated December 15, 1987, an immigration judge found the respondent deportable as charged, denied his application for relief from deportation, but accorded him privilege of voluntary departure. The respondent appealed and thereafter also moved that the deportation proceedings be remanded. The appeal will be dismissed. The motion to remand will be denied.

The respondent testified that he fears returning to Hungary because he evaded military service in that country. He did not articulate his motivation for evading the compulsory military service that he was required to perform.

The respondent bears the evidentiary burdon of proof and persuasion in any application for withholding of deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. §1253 (h) or asylum under section 208(a) of the Act, 8 U.S.C. §1158(a). Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. § 208.5, 242.17 (c). The respondent must establish the facts underlying a claim for such relief by preponderance of cerdible, probative evidence. The respondent must also establish that the facts proven satisfy the statutory standards of eligibility for these forms of relief. Matter of Acosta, supra.

To be eligible for withholding of deportation pursuant to section 243(h) of the Act, the facts presented by an alien must show clear probability

persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. INS v. Stevic, 467 U.S. 407 (1984). This means that those facts must establish that it is more likely than not that the alien would be subject to persecution for one of the grounds specified. Id.

To be eligible for asylum undersection 208(a) of the Act, an alien must meet the definition of a "refugee," which requires there to be a showing of persecution or well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42)(A) of the Act, 8 U.S.C. §1101(a)(42)(A). In order to establish a well founded fear of persecution, the alien's evidence must show (1) that the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) that the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) that the persecutor

has the capability of punishing the alien; and (4) that the persecutor has inclination to punish the alien. Matter of Mogharrabi, supra.

The "well-founded fear" standard used for asylum is less stringent standard than the "clear probability" standard used for withholding of deportation. INS v. Cardoza-Fonseca, 480 U.S. 421, (1987). An alien has established a well-founded fear of persecution if it is shown that a reasonable person in the same circumstances would fear persecution if returned to that person's native country. Matter of Mogharrabi, supra; Carcamo-Flores v. INS, 805 F. 2d 60 (2d Cir. 1986); Guevara-Flores v. INS, 786 F. 2d 1242 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987).

We find that the respondent failed to establish that he had a well-founded fear of persecution if he returns to Hungary. We have held that because conscription for military service does not constitute persecution, a person who fears returning to a given country only because of prior unwillingness to perform military service has not demonstrated eligibility for

asylu. Matter of vigil, 19 I&N 572 (BIA 1988); Matter of Lee, 13 I&N Dec. 236 (BIA 1969).

Inasmuch as the respondent failed to satisfy the lower burden of proof for asylum, it followed that he also failed to satisfy the clear probability standard of eligibility for withholding of deportation. The evidence did not establish that it was more likely than not that the respondent would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act. Accordingly, the instant appeal will be dismissed. However, we will now consider the motion to reopen submitted by the respondent approximately 9 months after the immigration judge rendered a decision in this case based on the events that had transpired during that period. 1/

A party seeking to reopen deportation proceedings must state the new facts that the party intends to

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1/ A motion to reopen submitted while an appeal is pending before the Board is treated as a motion to remand pursuant to C.F.R. § 3.1(d)(2). See Hurwitz, motions Practice Before the Board of Immigration Appeals, 10 San Diego L. Rev. 79, 91 (1982) reprinted in 6 Immigration and Naturalization Law Review, 472, 484 (1984).

establish, supported by affidavits or other evidentiary material. 8 C.F.R. §§ 3.2; 3.8; 103.5; INS v. Wang, 450 U.S. 139 (1981); Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (BIA 1983, A.G. 1984); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982).

Subsequent to denial of the respondent's request for asylum and withholding of deportation, the respondent's mother, who continues to reside in Hungary, transmitted a letter to then First Lady Nancy Reagan addressing the plight of her son. A response to that letter was prepared by Assistant Commissioner, Refugee, Asylum and Parole, of the Immigration and Naturalization Service, and was transmitted to the respondent's mother in Hungary. According to letter from the respondent's mother to the respondent, as a result of having received that letter, respondent's mother was visited at her home by Hungarian authorities who beat her and destroyed property in her home. A photograph of a woman who appears to have been physically abused, allegedly the respondent's mother, was submitted

by the respondent. This sequence of events occured during the first several months of 1988.

The respondent's motion to reopen seeks to establish that because he has applied for asylum in the United States, which, by virtue of correspondence from the United States government to his mother in Hungary, has come to attention of the Hungarian authorities, he now has an additional basis to fear persecution in Hungary. We note that the correspondence directed to the respondent's mother was received in 1988. In that year, Hungary was governed by a Communist political apparatus and secret police and other coercive institutions in Hungary were active and powerful. Country Reports on Human Rights Practices for 1988. Committee on Foreign Relations U.S. Senate and Committee on Foreign Affairs U.S. House of Representatives by the Department of State, 101st Congress, 1st Session (February 1989). This is no longer the case. In 1990, Hungary evolved into a working multiparty democracy and reports of interference by the state security apparatus with private communications ceased. Further, current

law establishes the right of Hungarian emigres to return to Hungary freely. Country Reports on Human Rights Practices for 1990, 1022d Congress, 1st Session (February 1991).

Given the changed circumstances in Hungary, we find that evidence submitted by the respondent is insufficient to warrant a remand of these proceeedings for further consideration of the respondent's request for asylum and withholding of deportation. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed and the motion to reopen is denied.

/s/ James P. Morris
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OFOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Atlanta, Georgia

File No: A 27 714 972 December 15, 1987

In the Matter of)
)
LASZLO PERE) IN DEPORTATION PROCEEDINGS
)
Respondent.)

CHARGE: Section 241(a)(2) of the Immigration and Nationality Act [8 U.S.C. Section 1251(a)(2) - non-immigrant remained longer than permitted.

APPLICATION: Section 208 - asylum, Section 243(h) - withholding of deportation, Section 244(e) - voluntary departure.

ON BEHALF OF RESPONDENT: David Farshi

ON BEHALF OF SERVICE: John Turov

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Hungary who entered the United States in New York City on December 3, 1986 as a visitor for pleasure. He was authorized to remain in the United States until June 3, 1987, but has remained beyond that date without authority of the Service and he is deportable pursuant to Section 241(a)(2) of the Act.

At his hearing, the respondent renewed an application for asylum or in the alternative,

withholding of deportation. Section 208 of the Act and Section 243(h) of the Act have provided relief for those individuals who fear persecution in their home country based on their race, religion, nationality, membership in aparticular social group, or because of their political opinion.

Attached to the respondent's application for asylum is an attachment in which the respondent describes his father as an alcoholic. Apparently his father caused caused problems for the respondent an his mother. In May of 1981, the respondent came with his mother to the United States and at that time he was fifteen years old.

The respondent at that time wanted to remain in the United States but his mother convinced him that it would not be wise to remain. Her quoted statement in his attachment is that your father will kill both of us.

The respondent further stated in his attachment thatafter he reached twenty years of age he determined that he would try and return to the United States and stay here. In this part of the application the

respondent has provided an official document from the Bureau of Passports of Hungarian Government. In that document it states that the respondent departed Hungary on December 3, 1986 with a personal passport and that he was to have returned on January 2, 1987. The document goes on to state that he has remained outside the United States beyond the acceptable date and he has been declared a fugitive from the country. Indeed a witness testified that another individual who returned after having remained outside of Hungary for too long a period of time was jailed for thirty days and then released.

In its letter, the Department of States applies that those Hungarians who have remained outside of their home country too long face the threat of prosecution for having remained too long, but goes on to state that its latest information indicates that the Hungarian Government does not punish those who stay their Hungarian exit permission for less than several years. Further, it is not clear how ones prosecution for disobeying the Immigration laws of the home country can be classified as persecution

in such a situation as this.

The respondent also believes that he would be imprisoned for evading the military service in Hungary. Many developed nations have conscription laws an in an effort to enforce them, also have criminal penalties for those who have evaded the military service in the country. Indeed in support of the application, the respondent has provided a copy of the Amnesty International Report for 1987, which indicates that military service was compulsary in Hungary. Article 336 of the Hungarian Criminal Code allows the Government to impose sentences for those who refuse military service. It appears that the respondent remained in school beyond his eighteenth birthday to aviod military service. To date, he has not refused induction into the army nor has he explained that his dislike of Hungarian military service would be for political or ideological reasons. It appears that he does not wish to remain in the country because of his father and not because of his dissatisfaction or stated opposition to the present Government there.

I would find that the respondent's fear of imrisonment if returned to Hungary is indeed a fear of prosecution and not persecution. Therefore, he has failed to establish that he has a well-founded fear of persecution based upon his race, religion, nationality, membership in a particular social group, or because of his political opinion. His application will be denied.

The respondent appears to be eligible to depart the United States voluntarily, and it also appears that he would merit it as a matter of discretion.

ORDER

IT IS HEREBY ORDERED that the application for asylum and withholding of deportation be and is hereby denied.

IT IS FURTHER ORDERED that the respondent be allowed to depart the United States voluntarily on or before January 16, 1988 at no expense to the Government.

IT IS FURTHER ORDERED that if the respondent does not depart when and as required, the following

Order shall be enter without further notice or proceedings: the respondent shall be deported from the United States to Hungary on the charges contained in the Order to Show Cause.

/S/ Charles E. Auslander, Jr.
CAHRLES E. AUSLANDER
Immigration Judge

CERTIFICATE OF SERVICE

I, David C. Farshy, a member of the Bar of this Court, Hereby certify that on this 20th day of July, 1992, three true copies of the foregoing petition for Writ of Certiorari were mailed, first class postage prepaid to the each of the following:

Keneth W. Starr, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

And

Richard M. Evans, Esquire
Donald A. Couvillon, Esquire
Civil Division
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

I further certify that all parties required to be served have been served.

David C. Farshy

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